Lian Hwee Choo v Oasis Development Pte Ltd

HIGH COURT (SINGAPORE) - ORIGINATING SUMMONS NO 532 OF 1984
SINNATHURAY J
29 JUNE 1989

Land Law - Option for sale of land - Agreement for sale of land for development - Repurchase of part of developed property - Whether contract subject to 1976 or 1985 form of Housing Developers Rules - Whether contract illegal for failure to obtain developer's licence - Whether contract rescinded for misdescription of size of property sold

Contract - Sale of flats - Size of completed flats greater than size in plans - Whether contract rescindable for misdescription

The plaintiff gave the defendants an option to purchase a piece of land ('the property'), which the defendants later exercised. Under cl 8 of the option, the defendants were to build 32 units of flats and under cl 11, the defendants were to sell the plaintiff four units of the flats at a price based on a formula set out in the clause. The sale of the property was then completed and, under cl 10 of the option, which provided that 40% of the price of the four flats were to be retained by the defendants upon completion of the sale, the defendants deducted the appropriate amount. Two years later, the defendants' lawyers informed the plaintiff that the floor areas of the four flats had been increased and the cost of the four units had correspondingly increased, 11% for two flats and 3% and 43% respectively for the other two flats. Later, the Housing Developers Rules 1985 ('the 1985 Rules') came into operation and replaced the 1976 Rules. The plaintiff sought a determination from the court that the agreement contained in cl 11 of the option was not enforceable against the plaintiff and the moneys paid by the plaintiff to the defendants should be refunded; alternatively that the plaintiff was entitled to rescind the agreement in cl 11 of the option on the ground of misdescription of the areas of the four flats and that the moneys paid should be refunded to the plaintiff; alternatively, that the defendants be ordered to enter into a sale and purchase agreement with the plaintiff in respect of the four flats in the form prescribed by the 1985 Rules, and that the defendants sell the four flats to the plaintiff in accordance with the terms set out in cl 11 of the option. The plaintiff argued that since r 20(3) of the 1985 Rules was stated to apply to any agreement executed at any time before or after the commencement of the Rules, the Rules were retrospective in nature and therefore the defendant ought to enter into with the plaintiff a sale and purchase agreement according to the 1985 Rules. The plaintiff also claimed that the option was an illegal contract as the defendants had not complied with the 1976 Rules which applied to housing developers, and hence it was unenforceable. Finally, it was claimed that the plaintiff was entitled to rescind the option on the grounds of misdescription as the areas of the four flats did not comply with the areas stated in the option.

Held, dismissing the plaintiff's application:

(1) The rights and liabilities of the parties had crystallized under the option long before the 1985 Rules were made. The 1985 Rules could not have retrospective effect to adversely affect the mutual obligation the parties had entered into under the option.

(2) Assuming that the 1985 Rules applied, there was a conflict between rr 20(2) and 20(3). A method of reconciling them was to find that the 1985 Rules did not prohibit the parties from adopting the 1976 form. The sale and purchase agreement between the plaintiff and the defendants would thus be executed in the 1976 form.

(3) The plaintiff's argument about the defendants not having complied with the 1976 Rules was rejected. At the time when the plaintiff gave the option to the defendants, the plaintiff was the owner of the property and she was the one who was to develop it. The defendants were only granted a licence for the project to build the flats later. It could not be said that under the option, the defendants were selling any property as developers.

(4) The submission that the plaintiff was entitled to rescind the agreement on the ground of misdescription of the area of the four flats was rejected. When the defendants entered into the option, it was impossible for them or the plaintiff to know with any degree of certainty the area of the units in the plans that would be submitted or what would be finally approved by the competent authority. The description of the flats and the approximate floor areas stated in cl 11 of the option was merely to identify the flats which the plaintiff wanted to purchase. The words used in the clause were words of description and not words of limitation. The floor areas were to be taken from the actual site survey made of the completed units for the issue of subsidiary strata certificate of title. The plaintiff and defendants were thus ordered to enter into an agreement for the sale and purchase of the four flats according to the 1976 Rules.

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No 2 of 1987.]

Legislation referred to

Housing Developers (Control and Licensing) Act (Cap 130, 1985 Ed) s 4
Housing Developers Rules 1985 rr 12(3), 20(2), (3)
Housing Developers Rules 1976

Joseph Ang and *John Ng* for the plaintiff.
Gan Hiang Chye and *Low Fook Cheng (Miss)* for the defendants.

Cur Adv Vult

Sinnathuray J: On 12 March 1981, the plaintiff gave the defendants an option to purchase a piece of land in Pasir Panjang, namely, lot no 112-3 mukim 3 at No 30 Jalan Pasir Ria ('the property'), containing an approximate area of 76,446 sq ft at $65 per sq ft. This option was exercised by the defendants on 13 April 1981. Under cl 8 of the option, the defendants were to build 32 units of flats and, under cl 11, the defendants were to sell to the plaintiff four units of flats at a price based on a formula set out in the said clause. Clause 11 states as follows:

> Purchaser shall sell four units to vendor as follows:
>
> two units on the fourth storey (upper maisonette - *second and fourth units away from the tennis* court) (each 140.71 sq m approx)
>
> one unit on the fifth floor (210.8 sq m approx) from the top (excluding the penthouse)
>
> one unit on the second highest storey (excluding the penthouse) (201.45 sq m approx)

the price to be based on $150 psf for construction costs plus the price of land herein including solicitors' costs and stamp fees and development charges divided by 32 units. The purchaser undertakes, to bind all subsequent assignees acquiring this property to observe this condition.

The sale of the land was completed on 1 November 1982. Thereupon, under cl 10 of the option which provides that 40% of the price the four units shall be retained by the defendants upon completion of the land, the defendants deducted the sum of $826,278.55 based on a total floor area of 7,953.2 sq ft.

On 2 April 1984, the defendants' solicitors sent four sets of the sale and purchase agreement to the plaintiff's solicitors and, in their covering letter, they informed the plaintiff that the floor areas had been increased and correspondingly the costs of the four flats. In terms of percentage the increase was 11.51% for two units, 37.70% and 43.98% for the other two respectively. By the same letter, the defendants also wanted to include interest on development charge in their computation; this was abandoned at the hearing. On 21 September 1984 the parties agreed that unit 4B2 (one of the four units) be transferred to Mr Cheng for whom the plaintiff had been acting as a nominee. This transfer was agreed to be without prejudice to the parties' right in the present proceedings. One other material event was that after the Housing Developers Rules 1985 came into operation on 4 January 1985, the plaintiff's solicitors requested the defendants' solicitors for the new form of the sale and purchase agreement but the defendants' solicitors took the stand that the new rules did not apply to the present transaction.

On these facts, in the re-amended originating summons, the plaintiff sought the determination of the court: (1) that the agreement contained in cl 11 of the option was not enforceable against the plaintiff and that the moneys paid by the plaintiff to the defendant be refunded to the plaintiff forthwith; (2) alternatively, that the plaintiff be entitled to rescind the agreement contained in cl 11 for the sale of the four flats on the ground of misdescription of the areas and that the moneys paid be refunded to the plaintiff; (3) alternatively, that the defendants do enter into a sale and purchase agreement with the plaintiff in respect of the four units (in the Pepys Hill Condominium) in the prescribed form pursuant to the Housing Developers Rules 1985; and (4) that the defendants sell the four units to the plaintiff in accordance with the terms and formula set out in cl 11.

At the conclusion of the hearing, I said that I accepted the main submission of counsel for the defendants that there was a valid and enforceable contract between the parties as set out in the option agreement and, accordingly, I dismissed the prayers sought by the plaintiffs in (1) and (2) above. As regards (3), I ordered that the plaintiff and defendants do enter into an agreement for sale and purchase of the three remaining units in accordance with the form prescribed by the Housing Developers Rules 1976 after the defendants have obtained the prior written consent of the Controller of Housing. Finally, on (4), I ruled that for the purpose of calculating the purchase price of each of the three remaining units, the formula for calculating the construction costs component of the overall price shall be $150 times the actual area of each of the three units respectively and not the approximate stated in cl 11 of the option, ie the square feet equivalent of 159 sq m, 285 sq m and 283 sq m respectively. The defendants were also given the costs of the application. The plaintiff is dissatisfied and has appealed against the decision that I now give my reasons. Counsel for the plaintiff raised three issues in the hearing.

(1) *The Housing Developers Rules*

The issue was whether the 1976 Rules or the 1985 Rules of the Housing Developers Rules applied to this case. The Housing Developers Rules 1985 which came into effect on 4 January 1985 revoked the Housing Developers Rules 1976 on the same day. The submission for the plaintiff was that as on 4 January 1985 the parties had not executed the sale and purchase agreement, any agreement entered into thereafter must be in the form prescribed by the 1985 Rules. It was argued that because r 20(3) of the 1985 Rules provides that the 1985 Rules shall apply to any agreement for the sale and purchase of a unit in a housing development executed at any time before or after the date of the commencement of the Rules, the Rules were clearly retrospective in nature and effect, and therefore the defendants must give to the plaintiff sale and purchase agreements as in Form E of the 1985 Rules.

In answer to this submission, Miss Low for the defendants said that the background facts were relevant. They are these. The plaintiff bought the land. Soon after, she engaged an architect to draw up plans for a condominium housing development of 32 residential units to be erected on the land. On 16 December 1980, she obtained from the competent authority under the Planning Act an approval in principle for the proposed development. Then, on 12 March 1981 she granted an option to the defendants to purchase the land on the condition that they would develop the land (cl 8) and sell to her four units (cl 11) selected by her. Even after the option was exercised, the plaintiff, through her architects, continued to deal with the competent authority. It was only on 16 December 1983 that the defendants were granted by the Controller of Housing a licence under s 4 of the Housing Developers (Control and Licensing) Act to undertake the development of the property. Counsel for the defendants next referred to the correspondence which she said clearly showed that at the time of the option, it was the intention of both parties that the 1976 Rules would apply. She

pointed out that pursuant to cl 11 of the option, the defendants on 2 April 1984 sent four sets of agreements under the 1976 Rules to the plaintiff for execution and the plaintiff accepted the agreements. Counsel contended that the present case fell directly under r 20(2) (and not r 20(3) as contended for the plaintiff) of the 1985 Rules which provides as follows:

> Notwithstanding the revocation of the Housing Developers Rules 1976, an option which was granted by a housing developer prior to the date of commencement of these Rules to any person for the purchase of a unit in a housing project shall continue to be in force until it has lapsed or has been exercised by intending purchaser as if these Rules have not been made.

On the plaintiff's claim that as from 4 January 1985, any agreement entered into must be in the form prescribed by the 1985 Rules, counsel submitted that that was correct only insofar as new purchases were concerned and that it did not apply to cases where the parties had binding contracts under the 1976 Rules. Counsel referred to *Maxwell on the Interpretation of Statutes* (12th Ed) at p 216:

> Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If an enactment is expressed in language which is capable of either interpretation,it ought to be construed as prospective only.

After the case was part heard, at the continued hearing, Mr Gan Hiang Chye appeared as counsel for the defendants. He said that whether the 1976 Rules or 1985 Rules applied was only a subsidiary issue and did not determine the outcome of the dispute between the parties as the crucial issue was the construction of cl 11 of the option and the real question was the enforcement of it. As to which Rules applied, he said, the defendants did not mind either way. However, as a matter of principle, he was bound to say that the 1976 Rules were applicable.

On this issue of law, I accepted the submissions of both counsel for the defendants. I was of the view that the rights and liabilities of the parties had crystallized under the option agreement long before the 1985 Rules were made. In any event, at that time the parties could not possibly have known or intended any other rules to apply to their transaction except the Rules. Moreover, the 1985 Rules cannot have retrospective effect to adversely affect the mutual obligations the parties had entered into under the option agreement. Next, assuming that the 1985 Rules applied, though there is a conflict between between rr 20(2) and 20(3) of the Rules, for the present purpose, I accepted the submission of Mr Gan that there was a simple way in which the form of agreement in the 1976 Rules can be used without breaching the 1985 Rules. As the 1985 Rules do not prohibit the parties from adopting the 1976 form, having regard to r 12(3) which provides that no amendment, deletion or alteration shall be made to an agreement without the prior approval in writing of the Controller, I made a declaration that the agreement for sale and purchase of the three units be executed between the plaintiff and the defendants in accordance with the prescribed form in the 1976 Rules, after the defendants had obtained the written consent of the Controller of Housing, which cannot unreasonably be withheld.

(2) *Validity of the option agreement*

For the plaintiff, the submission was that the agreement contained in cl 11 of the option was not enforceable against her because the option was not in the form prescribed by the 1976 Rules. The argument was that as licensed housing developers, the defendants, not having complied with the Rules, were at fault and, having committed an offence punishable with fine or imprisonment, the defendants cannot sue on the contract. I rejected this argument for the simple reason that when the plaintiff gave the option to the defendants, the defendants were not the developers of the project. At that time, on 12 March 1981, it was the plaintiff who was the owner of the land and it was she who was going to develop the property. The defendants completed the sale on 1 November 1982. Even then they were not the housing developers of the property. It was only on 16 December 1983 that the defendants were granted the licence for the project. Therefore, it cannot be said that under the option agreement the defendants were selling any property as housing developers. Clause 11 of the option was one of the conditions of sale and purchase of the land by the parties. As counsel for the defendants put it, there was nothing wrong with the option agreement as a contract. The agreement between the parties was that when the defendants became the legal owners of the property, the defendants would develop the condominium in accordance with the approval the plaintiff had obtained and sell four units selected by the plaintiff to her; and, the plaintiff in turn bound herself to the defendants to buy the units from the defendants.

(3) *Rescission of the option agreement*

The issue is one of fact. The submission was that the plaintiff was entitled to rescind the agreement on the ground of misdescription of the areas of the three units. Counsel for the plaintiff argued that since the parties had agreed on the areas of the units and inserted them in the option, the parties were bound to proceed according to the agreed terms by entering into the sale and purchase agreements on the areas stated in the option. On the use of the word 'approx' in cl 11 of the option, the ordinary meaning of it being 'very near, fairly correct, near to the actual' (see *Concise Oxford Dictionary* (New Ed)), it was said that that did not entitle the defendants to force upon the plaintiff units with increased areas of between 11.50% and 43.98%.

The submission was, in my view, untenable on the facts. The crucial fact that was not fully appreciated by the plaintiff was that when the defendants entered into the option agreement what was given to them by way of plans was a location plan, a proposal plan (a bare sketch) and rudimentary data, including the proposed floor area per unit of the 32 units in the condominium. It was those floor area that were incorporated in cl 11 of the option as approximate floor areas. It was impossible at that time for the plaintiff or the defendants to know with any degree of certainty the area of the units in the plans that would be submitted or what would be finally approved by the competent authority. I agree with counsel for the defendants that the description of the units and the approximate floor areas stated in cl 11 was merely to identify the units which the plaintiff wanted to purchase. It must be so as at the date of the option, there were no detailed plans of the units, and the plaintiff had to stipulate by way of height, location and size the units she wanted for herself. I found that the words used in cl 11 were words of description and not words of limitation. For these reasons, I held the floor areas of the three units were to be taken from the actual site survey made of the completed units for the issue of the subsidiary strata certificates of titles and not those stated in cl 11 of the option.

Application dismissed.

Solicitors: *Lee & Lee; Tan Lee & Partners; Allen & Gledhill; Low Fook Cheng & Co.*

Reported by *Terence Tan Bian Chye*

Re Chong Lee Leong Seng Co (Pte) Ltd

HIGH COURT (SINGAPORE) - COMPANIES WINDING-UP NO 77 OF 1989
CHAN SEK KEONG J
26 JUNE 1989

Companies & Corporations - Oppression - Section 216 relief sought - Winding-up - Proceedings begun as winding-up petition - Application to strike out petition - Whether proceedings begun by proper method - Whether defect in starting proceedings a defect or mere irregularity - Companies Act (Cap 50, 1985 Ed), ss 216, 254, 255, 257, 258, 259, 260, 261, 262(3), 267 & 335 - Companies (Winding Up) Rules 1969, r 191 - Rules of the Supreme Court 1970, O 2 r 1, O 88 rr 2, 5 & 7 - Companies Act 1948 [UK], s 210(5) - Winding Up Rules 1949 [UK] - Companies Act 1961 [Aust], s 186 - Companies Act 1965 [Mal], ss 181, 186 & 221(2)(e) - Companies Act [Ghana], s 218

Civil Procedure - Winding-up petition - Whether proper to begin proceedings for relief under s 216 of Companies Act (Cap 50, 1985 Ed) by winding-up petition - Rules of the Supreme Court 1970, O 88 rr 2, 5 & 7

The petitioners were minority shareholders in the Chong Lee Leong Seng Co (Pte) Ltd ('the company'). They started proceedings against the company for relief under s 216 of the Companies Act (Cap 50, 1985 Ed) ('the Act'). The company applied to strike out the proceedings on the ground that they were wrongly started by a winding-up petition when the proper method was by originating petition.

Held, allowing the company's application and ordering that the petition be struck out:

(1) As 216 action under the Act is generally known as an action for oppression. One of the available reliefs as an alternative to others is the winding up of the company.

(2) The primary issue (which was whether proceedings under a s 216 petition which includes an order for winding-up are winding-up proceedings) raises an important question of substantive law as to the nature of an action (which includes the winding-up relief) under s 216 of the Act. Its importance lies in the ensuing legal disabilities and consequences upon the commencement of winding-up proceedings against a company, its shareholders and directors and also outsiders who have dealings with the company.

(3) There are good reasons why proceedings commenced under s 216 of the Act should not be regarded as a winding-up petition. This section departs significantly from the English and Australian antecedents. A criticism of the English antecedent was that the traditional remedy for oppression of the minority shareholders was to petition for a winding-up order. But this remedy was in many cases worse than the oppression. When the Ghanaian Companies Act was drafted, the corresponding section did not tie the oppression actions to winding-up petitions. Section 216 of the Act was modelled on this section of the Ghanaian Act.

(4) Consonant with the object of s 216, a court in Singapore will not wind up a company on the ground of oppression where any of the other reliefs provided therein is a sufficient remedy to bring an end to the matters complained of, notwithstanding Lord Wilberforce's statement in *Re Kong Thai Sawmill*[4] that the winding-up option ranks equally with the other reliefs.

(5) Section 216 as enacted has also expressly omitted the application of s 410(d) of the Act which provides for the making of rules generally for the winding up of companies to s 216. The